Supreme Court, U.S.
FILED
DEC 18 1997
CLERK

No. 97-822

In The

Supreme Court of the United States

October Term, 1997

FAIR; FIRST ASSEMBLY OF GOD OF VENTURA, JAMES W. WILLIAMS, III; R.H. SMITH FAMILY PARTNERSHIP; LEAVENS RANCHES; ROBERT TOBIAS; STEPHEN TOBIAS, J.D. McGRATH FARMS; HOWARD AND HOWARD RANCH, DANIEL CAMPBELL, ITO FARMS, THE CONTRERAS FAMILY and HIJI BROS.,

Petitioners,

vs.

CITY OF SAN BUENAVENTURA; and the CITY OF SAN BUENAVENTURA CITY COUNCIL,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Equal Protection and Due Process Clauses of the United States Constitution prohibit city voters from determining, via an ordinance enacted by initiative, that agricultural lands deserve special protections, unless such voters also apply similar protections to all other categories of land?

II. Whether the Equal Protection and Due Process Clauses of the United States Constitution require a city to extend voting rights to individuals who reside outside city borders, but within the city's "planning area," where state law unambiguously establishes that the city possesses no control over or jurisdiction to actually regulate land uses on these nonresidents' property?

III. Whether a city ordinance's requirement for voter approval of any changes to the city's general plan provisions governing agricultural lands violates the Free Exercise Clause of the United States Constitution simply because a church happens to own a parcel of land subject to that valid and neutral requirement?

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APPENDIX

Appendix 1 — Order Of The Court Of Appeal Of The State Of California For The Second Appellate District, Division Six, Filed October 30, 1996 ..... 1a

Appendix 2 — Order Of The Supreme Court Of California, Filed December 18, 1996 ..... 2a

Respondents City of San Buenaventura and City of San Buenaventura City Council respectfully request that this Court deny the petition for writ of certiorari seeking review of the California Court of Appeal's judgment in this case.

OPINIONS BELOW

In addition to the three opinions set forth in the petition for writ of certiorari, the following two unpublished opinions were issued in this case: (1) the order of the California Court of Appeal, Second Appellate District, Division Six, denying petitioners' request for an extraordinary writ of mandamus that would direct the trial court to overturn its decision, attached hereto as Appendix 1 ("App. 1"); and (2) the opinion of the California Supreme Court denying review of this order, attached hereto as Appendix 2 ("App. 2").

STATEMENT OF THE CASE

Respondents City of San Buenaventura and City of San Buenaventura City Council ("City" or "Ventura") present the following Statement of the Case to supplement that presented by petitioners Farmers, Families & Friends Against Irresponsible Regulations, et al. (collectively "FAIR"). FAIR's statement mischaracterizes the nature, scope, basis for, and effect of Measure I and is replete with legal conclusions cast as factual assertions. FAIR's statement also ignores the central, long-standing role of the initiative process in California's constitutional scheme, the general plan's role in guiding orderly development in California, and two of the state court appellate proceedings that summarily rejected petitioners' claims. What follows is a correction of erroneous statements, a more balanced presentation of Measure I,[1] and a brief description of the initiative and land use planning processes in California.

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1. The provisions of Measure I were enacted as Ordinance 95-33, which is included in the Appellants' Appendix in Lieu of Clerk's Transcript ("AA") at 33-39.

A. Measure I

On November 7, 1995, Ventura voters adopted Measure I through the exercise of the initiative power that Californians reserved to themselves in the State's Constitution. Measure I readopted that portion of the Land Use Plan Map of the City's "General Plan" designating particular land in the City and its planning area as "Agricultural Use."[2] Measure I, § 2, AA at 35-37. Measure I also readopted portions of the General Plan's Land Use Element defining the "Agricultural Use" category, and it amended that definitional provision to ensure the long-term protection of agricultural lands. *Id.*

In addition, Measure I inserted a new section into the Amendment Procedures of the City of Ventura General Plan. This section provides that until December 31, 2030, except under certain specified conditions, the readopted Agricultural Use designations may be amended only if approved by vote of the people. *Id.* However, Agricultural Use lands can be redesignated without a vote of the people if:

> (1) the redesignated land is unsuitable for agricultural use, provided certain conditions are met; or
>
> (2) the redesignation is necessary to avoid an unconstitutional taking of property.

Id. Further, Measure I does not apply to development projects that had received certain preliminary approvals as of the measure's effective date. Measure I, § 4, AA at 38.

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2. California law requires each city to adopt and, as circumstances warrant, periodically review and revise, a comprehensive, long-term general plan for the physical development of the lands within its boundaries and surrounding areas. Cal. Gov. Code §§ 65300, 65358; *see generally DeVita v. County of Napa*, 9 Cal. 4th 763, 788, 889 P.2d 1019, 1035 (1995).

In its statement, FAIR contends that Measure I's "substantive effect is to *prohibit* necessary development and thereby deprive property owners . . . from providing necessary urban facilities such as housing . . . ." Petition for Writ of Certiorari ("Petition") at 3 (emphasis added). FAIR's characterization of Measure I's effect is wholly unfounded.[3] On its face and as a matter of state law, Measure I does not prohibit any development; nor does it impose more restrictive designations on land use than previously existed. Rather, by preserving existing land use categories, it seeks to channel and promote orderly development. Measure I, § I, AA at 34.

Measure I is thus a conservative document. It does not adopt a moratorium on development of urban lands, place a cap on the number of units that can be built, or reduce the areas designated for urban development. Instead, its purpose is to preserve existing agricultural uses within the City and to encourage the County to preserve such uses in those areas outside the City's boundaries that are within its planning area. *Id.* Measure I simply ensures that critical, *pre-existing* plan provisions will be implemented over the long-term and not compromised by a series of individual, "piecemeal" amendments that would undermine protection of agriculture. *Id.* In short, as the California Supreme Court concluded with respect to a virtually identical initiative measure in Napa County, after a full trial and extensive briefing, such measures are

> a reasonable attempt to effectuate the[ ] purposes [of California planning law] by delineating a long-range policy intended to guide the [City's] development, curb haphazard growth, and promote desired land uses.[4]

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3. For the purposes of sustaining a demurrer under California law, courts must reject conclusions born of such pure speculation. *Blank v. Kirwan*, 39 Cal. 3d 311, 318, 703 P.2d 58, 61-62 (1985); *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 827, 134 Cal. Rptr. 839, 841 (1976); Appendix to Petition for Writ of Certiorari ("App.") at A-3, A-9.

4. *See* App. at A-2 (noting that Measure I is patterned after Napa County's Measure J); AA at 218-32 (reprinting full text of Measure J).

DeVita, 9 Cal. 4th at 792, 889 P.2d at 1037. Contrary to FAIR's suggestions, there is nothing radical about such an enactment.

B. Constitutional Reservation of Initiative Power in California

As this Court noted in *James v. Valtierra*, 402 U.S. 137, 141 (1971), "California's entire history demonstrates the repeated use of referendums [and initiatives] to give citizens a voice on questions of public policy."[5] A referendum provision was included in the state's first Constitution, *id.*, and the people of California subsequently reserved the initiative and referendum power to themselves in the 1911 Amendments to the California Constitution. Cal. Const. Art. IV, § 1. This reserved power can be exercised at the local level, "and is generally coextensive with the legislative power of the local governing body." *DeVita*, 9 Cal. 4th at 775, 889 P.2d at 1026; *see* Cal. Const. Art. II, § 11. For over two decades, California courts have consistently upheld the use of initiatives in the land use context. *DeVita*, 9 Cal. 4th at 774-75, 889 P.2d at 1025-26 (citing cases); *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473 (1976), *overruling Hurst v. City of Burlingame*, 207 Cal. 134, 277 P. 308 (1929); *see also Hopping v. City of Richmond*, 170 Cal. 605, 150 P. 977 (1915); *In re Phaler*, 150 Cal. 71, 88 P. 270 (1906).

Moreover, California, unlike some other states, prohibits an

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5. In California, the initiative and referendum are distinct procedures used, respectively, to enact legislation in the first instance, or to adopt or reject legislation already enacted by a legislative body. Cal. Const. Art. II, §§ 8(a) & 9; *Rossi v. Brown*, 9 Cal. 4th 688, 695-98, 889 P.2d 557, 560-62 (1995). This Court has used the term "referendum" generally, however, to encompass both types of procedures. *Santa Clara County Local Transportation Auth. v. Guardino*, 11 Cal. 4th 220, 243, 902 P.2d 225, 239 (1995) (observing that in *James* and *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976), "referendum" was used "simply as a label of convenience" for any type of popular vote or plebiscite on a public measure).

initiative from being amended or altered except by vote of the people, unless the initiative itself provides otherwise. Cal. Const. Art. II, § 10(c) (statewide initiatives); Cal. Elec. Code § 9125 (local initiatives); *James*, 402 U.S. at 142; *DeVita*, 9 Cal. 4th at 796, 889 P.2d at 1040. This requirement is necessary to limit the ability of a hostile legislative body to evade or repeal the people's will. *Id.* at 797, 889 P.2d at 1041.

C. The Role of The General Plan Under California Law

California law requires each city and county to adopt a long-term general plan for the physical development of the lands within its boundaries. Cal. Gov't Code § 65300. The general plan must also cover a city's "planning area," which includes

> "any land outside its boundaries which in the planning agency's judgment bears relation to its planning" (Government Code section 65300) . . . . [S]ince certain issues are not confined to political boundaries, the law provides for *planning* outside of the jurisdiction's territory. This is a means by which a local government can formally communicate its concerns for the future of lands *under its neighbors' jurisdictions*.

Governor's Office of Planning and Research, *State General Plan Guidelines* (1990) at 6, AA at 402 (emphasis added).

A city's extraterritorial planning area generally coincides with its "sphere of influence." This "sphere," in turn, depicts the ultimate "probable physical boundaries and service area" of that city, as determined by the county's Local Agency Formation Commission, and facilitates cooperative planning between cities and the county in which they lie. *Id.* at 6-7; Cal. Gov't Code § 56076; *see generally* Peter M. Detwiler, "Annexation and Boundary Issues," 5 *California Environmental Law and Land Use Practice*, § 73.02 at 73-5 (1997) ("Detwiler").

Contrary to FAIR's repeated suggestions, however, such extraterritorial pre-planning, which courts have consistently upheld, has no actual regulatory effect. Rather, a city can actually regulate land uses in an area *only* " 'in the event of subsequent annexation to the city.' " *City of Irvine v. Irvine Citizens Against Overdevelopment*, 25 Cal. App. 4th 868, 877, 30 Cal. Rptr. 2d 797, 801 (1994) (quoting Cal. Gov't Code § 65859); *see also City of Agoura Hills v. Local Agency Formation Comm'n*, 198 Cal. App. 3d 480, 490, 495, 243 Cal. Rptr. 740, 746, 749 (1988) (noting that such areas might never actually be annexed and that "[s]pheres of influence" are merely "flexible planning and study tool[s] to be reviewed and amended periodically as appropriate"); App at A-5. By contrast, within city *boundaries*, the general plan serves as the "constitution" for future development to which all subordinate land use regulations must conform. *DeVita*, 9 Cal. 4th at 773, 889 P.2d at 1024.

In short, under the California Constitution and the State's Planning and Zoning Law, the respective regulatory jurisdictions of cities and counties are entirely separate:

> The *police power* regulation of land use in California is *mutually exclusive*; that is, city limits define whether a city council or a county board of supervisors makes crucial land use decisions. . . . For example, if a county planned and zoned a particular piece of unincorporated property for large-scale agricultural use, and the adjacent city planned and pre-zoned the same property for single-family residential development, then *changing the city's boundary* would lead to changing the basic land use policy for that property.

Detwiler, *supra*, § 73.02, at 73-5 (italics added); *see also* Cal. Const. Art. XI, § 7; Cal. Gov't Code §§ 65100, 65300, 65800, 65850; *Longtin's California Land Use*, § 1.13[5] (2d ed. 1987 and 1997 Supp.). Thus, for land outside City boundaries,

Measure I is simply a planning document; it does not regulate land use at all.

D. Proceedings Below

FAIR's recitation of the proceedings below omits two crucial facts. First, FAIR neglects to mention that — in addition to the trial court's sustaining of the City's demurrer without leave to amend, the Court of Appeal's thorough opinion upholding this decision, and the California Supreme Court's summary denial of review — the Court of Appeal and the California Supreme Court also both summarily rejected FAIR's attempt to overturn the trial court's decision through the extraordinary remedy of mandamus relief. App. 1-1, 2-1; *see also* Petition for Review, No. S057282; Answer to Petition for Review, No. S057282.

Second, FAIR neglects to mention that, in addition to the three causes of action presented in the instant Petition, the Complaint also contained four other, equally meritless claims, one of which directly bears on FAIR's second Question Presented. In that question, FAIR asks this Court to determine that Measure I violates petitioners' voting rights because, they claim, the measure "regulates" land outside the City's boundaries without extending the right to vote to the nonresidents affected by this alleged extraterritorial regulation.

This alleged extraterritorial effect of Measure I, which turns solely on questions of state law, also formed the linchpin of FAIR's unmentioned fourth cause of action. Specifically, FAIR there contended that Measure I's extraterritorial effects violate the California Constitution's limitation on a City's ability to regulate land outside its boundaries. AA at 19-20 (Complaint ¶¶ 49-53). The Court of Appeal emphatically rejected this claim because, under well-established and unambiguous state law, Measure I's designations have no regulatory effect whatsoever on land outside the City's boundaries. App. at A-13 to A-14; *see also* AA at 19-20 (Complaint ¶¶ 49-53); Respondents' Brief on Appeal at 37-42.

Petitioners themselves ultimately abandoned this claim: it was the only one of the seven causes of action that they did not seek review of in their second petition to the California Supreme Court. In short, as a matter of state law, the essential predicate to FAIR's voting rights claim is simply erroneous.

REASONS FOR DENYING THE WRIT

FAIR claims that this case warrants review under Supreme Court Rule 10(c) because, they allege, "[t]his case raises important federal constitutional issues that have not been, but should be, settled by this Court." Petition at 7. What FAIR fails to acknowledge, however, is that this Court has already settled each of the questions raised in the instant Petition. Nor has FAIR pointed to any conflict with relevant decisions of this Court. Indeed, in rejecting FAIR's five attempts to overturn Measure I, the California courts applied well-established precedents of this and other courts. The City urges this Court to do likewise and put a final end to this clearly meritless litigation, which does not conceivably raise any issues meriting review by this Court.

I.

THIS CASE PRESENTS NO ISSUES MERITING SUPREME COURT REVIEW BECAUSE THIS COURT HAS ALREADY ADDRESSED EACH OF THE ISSUES RAISED BY THE PETITION.

A. This Court Expressly Rejected FAIR's Equal Protection and Due Process Claims in *James v. Valtierra* and *City of Eastlake v. Forest City Enterprises*.

In its first Question Presented, FAIR contends that Measure I violates petitioners' equal protection and due process rights because "only owners of agriculturally designated property are forced to go through the initiative process to get their property redesignated." Petition at 8. Petitioners do "not challeng[e] the City's right to zone

property as 'Agricultural Use,' " *id.*, nor do they question either Measure I's findings on the need to protect agriculture or the rationality of the General Plan policies that the initiative readopts and promotes. Instead, they restrict their challenge to the initiative's voter approval requirement, which, they assert, lacks a rational basis. *Id.* at 8, 11. While petitioners purport to argue that this aspect of Measure I is irrational, the necessary implication of their challenge is that either: (1) the Equal Protection and Due Process Clauses prohibit the use of an initiative to readopt certain land use designations unless all such designations are readopted by the same initiative; or (2) California's requirement that legislation enacted by initiative may only be amended by subsequent vote of the people somehow violates these clauses of the United States Constitution.

To state either proposition is to establish its complete lack of merit for review. What makes the instant Petition particularly unwarranted, however, is FAIR's failure even to mention, let alone address, *James v. Valtierra*, 402 U.S. 137 (1971), in which this Court expressly rejected a nearly identical claim.

James upheld a mandatory California voter approval requirement that applied exclusively to low-rent housing projects. The plaintiffs had there argued that the "mandatory nature" of this requirement violated the Equal Protection Clause because

> it hampers persons desiring public housing from achieving their objectives *when no such roadblock faces other groups* seeking to influence other public decisions . . . .

James, 402 U.S. at 142 (emphasis added); *compare* Petition at 11 ("There is no rational basis to single out one class of property owners and require them to expend greater time and resources than any other class of property owners . . . .").

This Court rejected this argument for the simple and obvious reason that,

> [u]nder any such holding, presumably, a State would not be able to require referendums on any subject unless referendums were also required on all *because they would always disadvantage some group.*

James, 402 U.S. at 142 (emphasis added). Accordingly, the Court upheld California voters' ability to impose a mandatory voter approval requirement on a particular classification via a particular initiative. *Id.* at 143. Moreover, the Court recognized that, as a matter of California law, such an initiative could not possibly "single out" that particular classification, because numerous other classifications are already subject to voter requirements.

> [A]n examination of California law reveals that persons advocating low-income housing have *not been singled out* for mandatory referendums while no other group must face such obstacles. Mandatory referendums are required for approval of state constitutional amendments, for the issuance of general obligation long-term bonds by local governments, and for certain municipal territorial annexations. California statute books contain much legislation first enacted by voter initiative, and no such law can be repealed or amended except by referendum. Some California cities have [also] wisely provided that their public parks may not be alienated without mandatory referendums. . . . This procedure for democratic decisionmaking does *not* violate the constitutional command that no State shall deny to any person "the equal protection of the laws.[6]

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6. That the voter approval requirement in *James* was imposed by an initiative amendment to the California Constitution, rather than by statute and local initiative, as here, is irrelevant for purposes of equal protection analysis. In any event, Measure I's voter approval requirement itself reflects the constitutional reservation of the initiative power to the (Cont'd)

Id. at 142-43 (emphasis added) (citations omitted); *see also* Cal. Elec. Code § 9125 (providing that local initiatives, such as Measure I, cannot be repealed or amended "except by the vote of the people unless provision is otherwise made in the original [initiative] ordinance").

Just as in *James* this Court rejected an equal protection argument virtually identical to petitioners' here, so too this Court in *City of Eastlake* expressly rejected the notion that a voter approval requirement for local land use decisions violates substantive due process.

> As a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause of the Fourteenth Amendment when applied to a rezoning ordinance.

City of Eastlake, 426 U.S. at 679. This is so because "[i]n establishing legislative bodies, the people can reserve to themselves the power to deal directly with matters which might otherwise be assigned to the legislature." *Id.* at 672.

As the Court recognized, this practice is designed to "allow[] the people the *final* decision, amounting to a veto power, over enactments of representative bodies." *Id.* at 673 (emphasis added). This veto power would be meaningless, however, if the legislative body could overturn the voters' determination at its whim, or, as all too frequently happens in the land use context, under pressure from special-interest developers. *See DeVita*, 9 Cal. 4th at 792, 795-97, 889 P.2d at 1037, 1040-41. Thus, far from being irrational

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(Cont'd)
people. Cal. Const. Art. II, § 11; Art. IV, § 1. Moreover, Measure I's exceptions actually make its voter approval requirement more limited than California Elections Code section 9125 would otherwise require. *See* Measure I, § 4, AA at 38 (allowing the city to redesignate lands without voter approval where the land is unsuitable for agriculture or where necessary to avoid an unconstitutional taking).

or arbitrary, the voter approval requirement is essential. Any local initiative, "to be effective, must limit the power of a hostile city council to evade or repeal the initiative ordinance." *Id.* at 797, 889 P.2d at 1041.

B. This Court Expressly Rejected FAIR's Voting Rights Claims in *Holt Civic Club v. City of Tuscaloosa*.

In its second Question Presented, FAIR alleges that Measure I violates some of its members' voting rights under the Equal Protection and Due Process Clauses. Specifically, FAIR alleges that, through Measure I, the City has denied persons who reside outside the City's borders, but within its planning area, the right to vote on "the designation, redesignation, or change of use of their property. . . ." Petition at 12. FAIR's argument thus rests on the assumption that such persons have a right to vote in City of Ventura elections. Under *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 75 (1978) ("*Holt*"), however, this "assumption . . . [is] erroneous." Such nonresidents have *no* right to vote in City elections. *Id.*

In *Holt*, an Alabama statute allowed cities to regulate, for police and sanitary purposes, an area three miles outside of their borders, but did not extend the right to participate in municipal elections to affected nonresidents. The challenged statutes subjected the residents of Holt — a small, unincorporated area outside the City of Tuscaloosa — to, among other things, the criminal jurisdiction of the city's court and the city's power to license and collect fees from businesses. *Id.* at 61-62. In addition, although not directly in issue, Alabama law subjected such nonresidents to the same pre-planning requirement as the California statute mandating that the City of Ventura pre-plan for extraterritorial areas. *Id.* at 62, n.3 (quoting Ala. Code § 11-52-8 (1975)); *see* Cal. Gov't Code § 65300. As with Ventura in the instant case, however, Tuscaloosa lacked the power actually to impose zoning restrictions on property outside its borders. *Holt*, 439 U.S. at 73, n.8; Cal. Gov't Code § 65859 ("prezoning" does not become effective unless and until territory is actually annexed).

The *Holt* plaintiffs, again like petitioners in the instant case, argued that Alabama's "extraterritorial extension of municipal powers requires concomitant extraterritorial extension of the [voting] franchise . . . ."[7] *Holt*, 439 U.S. at 69. This Court expressly rejected this argument, however, concluding that such nonresidents had no right to vote in city elections. *Id.* at 68-70, 75. Voting rights are implicated, the Court held, only where individuals "physically resident within the geographic boundaries of the governmental entity concerned" are denied participation in that entity's elections. *Id.* at 68. Indeed, the Court explained, "our cases have *uniformly* recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." *Id.* at 68-69 (emphasis added). Thus, citizens must be *bona fide* residents of a city to vote in that jurisdiction's elections. *Id*; *see also* Cal. Const. Art. II, § 2; Cal. Elec. Code § 10000; *Collier v. Menzel*, 176 Cal. App. 3d 24, 33, 221 Cal. Rptr. 110, 113-14 (1985); Laurence Tribe, *American Constitutional Law* § 13-12, at 1088-89 (2d ed. 1988).

Holt is squarely on point here. As FAIR concedes, the members on whose behalf it brings this claim are not *bona fide* residents of the City of Ventura. Petition at 11. FAIR also concedes that state law requires the City to pre-plan for areas outside its limits and

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7. FAIR contends that, unlike the *Holt* plaintiffs, who allegedly "sought an extension of the voting franchise on an 'equal footing,' " the petitioners here allegedly seek a "much more limited" right to vote. Petition at 13. That contention, however, is multiply flawed. First, this Court placed no weight on the extent of voting rights sought by Holt residents; rather, it rejected altogether "the assumption . . . that they have a right to vote in Tuscaloosa elections." *Holt*, 439 U.S. at 75. Second, FAIR's statement that it seeks only a "much more limited" extension cannot mask the inevitable fact that, at the very least, granting nonresidents "the right to vote [] on those matters which [allegedly] directly impact them," Petition at 13, would necessitate granting them the right to elect and recall City Council members. After all, the City Council was the body that originally designated these nonresidents' land for agricultural use, pursuant to California Government Code section 65300.

that such pre-planning is constitutional.[8] In addition, although petitioners conclusorily assert that Measure I "controls land use of substantial parcels of property outside City's territorial limits," Petition at 14, as a matter of California law, Measure I has no regulatory effect on these lands because they remain under the *exclusive* jurisdiction and control of the County. App. at A-4 to A-7, A-13 to A-14; Cal. Const., Art. XI, § 7; Detwiler, *supra*, § 73.02 at 73-5 ("[C]ity limits define whether a city council or a county board of supervisors makes crucial land use decision.").

Indeed, to the extent that the City's land use designations have any effect at all on nonresidents' lands, it is only because the County of Ventura, through its voluntarily adopted "guidelines," chooses to follow them. *See, e.g., Ventura County Guidelines*, AA at 80 ("Land uses which are allowed by the County without annexation should be equal to or more restrictive than land uses allowed by the City."). Thus, if the County wishes to redesignate petitioners' lands or simply ignore Measure I's designations, "there is nothing in Measure I to prevent it." App. at A-5. The voting rights of FAIR members in unincorporated County lands thus remain fully intact because they may vote in County elections.

Accordingly, as in *Holt*, the "inquiry is limited to the question whether 'any state of facts reasonably may be conceived to justify' " the state's pre-planning requirement. 439 U.S. at 74; *see also id.* at 75 (same inquiry governs Due Process challenge).[9] Measure I and

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8. *See, e.g.*, Appellants' Reply Brief at 19 ("Appellants do not object to preplanning by City outside its boundaries . . . Appellants are not objecting to City's preplanning"); *id.* at 22 ("FAIR reemphasizes that it is not attacking the preplanning requirements of Section 65300.").

9. FAIR's statement that strict scrutiny applies where a city " 'exclud[es] *otherwise qualified voters*,' " Petition at 12 (citing *Collier v. Menzel*, 176 Cal. App. 3d at 33, 221 Cal. Rptr. at 114 (emphasis in original), misses this essential point. Nonresidents are *not* otherwise qualified voters. *Holt*, 439 U.S. at 67-69. Likewise, as discussed below, the Court of Appeal correctly rejected FAIR's other attempts to distinguish *Holt*.

the pre-planning statutes it implements readily survive this test. Just as the

> Alabama Legislature could have decided that municipal corporations should have some measure of control over activities carried on just beyond their "city limit" signs, particularly since today's police jurisdiction may be tomorrow's annexation to the city proper,

id. at 74, so too the California Legislature and the City of Ventura could have decided that the City should pre-plan for these areas to promote orderly development.

C. This Court Has Repeatedly Held That The Free Exercise Clause Does Not Relieve an Individual of the Obligation To Comply With a Valid and Neutral Law of General Applicability Such as Measure I.

In the last of its three Questions Presented for Review, Petitioner First Assembly of God of Ventura ("Church") argues that "a city ordinance that requires a public vote on the use of church land violates the rights of freedom of religion, privacy, equal protection, and due process of law of that church and its members." Petition at i. In other words, the Church contends that, simply because Measure I applies to lands owned by the Church and may require a public vote on those lands, the measure violates the Free Exercise Clause. Like the first two Questions Presented, however, this third question implicates only settled law. In two recent decisions, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *City of Boerne v. Flores*, __ U.S. __, 117 S. Ct. 2157 (1997), this Court has rejected the very argument that the Church once again seeks to place before it.

In *Smith*, plaintiffs were dismissed from their employment after using peyote for religious purposes. They argued that the State's

denial of unemployment benefits to them for such "misconduct" violated their Free Exercise rights. The Court emphatically rejected that position, noting that it had never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. Instead, said the Court, its decisions

> have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes or prescribes conduct that his religion prescribed (or proscribed).

494 U.S. at 879. Refusing to hold that a compelling interest is required before such a regulation can be upheld, the Court declared:

> [G]overnment's ability to enforce generally applicable prohibitions of socially harmful conduct . . . "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling . . . contradicts both constitutional tradition and common sense.

Id. at 885.

Petitioner Church argues that Measure I violates its rights under the Free Exercise Clause because it seeks to use its land for church purposes and under Measure I cannot do so until a vote amends the City's General Plan. But this argument merely reiterates, in a different factual context, the same argument made by the plaintiff in *Smith*: that "when otherwise prohibitable conduct is accompanied

by religious convictions, not only the convictions but the conduct itself must be free from government regulations." *Id.* at 882. The Court in *Smith* rejected that argument, and no reason exists for the Court to revisit this settled issue in the present litigation.

Moreover, only last term, in *City of Boerne v. Flores*, __ U.S. __, 117 S. Ct. 2157 (1997), this Court re-affirmed the principles enunciated in *Smith*. In considering the constitutionality of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*, the Court once more approved the *Smith* holding: that "neutral generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." __ U.S. at __, 117 S. Ct. at 2161. The Court went on to note that the "only instances where a neutral, generally applicable law had failed to pass constitutional muster . . . were cases in which other constitutional protections were at stake." __ U.S. at __, 117 S. Ct. at 2161 (citing *Smith*, 494 U.S. at 881-82). As an example of this narrow exception to the general rule of *Smith*, the *Boerne* decision cited *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, a mandatory school-attendance law was found invalid as applied to Amish parents because it implicated not only the Free Exercise Clause but also the rights of parents to control their children's education. *Boerne*, __ U.S. at __, 117 S. Ct. at 2161.

In a contrived effort to fit itself within this narrow and well-established exception, the Church now claims that Measure I violates its rights to privacy and equal protection.[10] Once again, however, the Church presents no claim of unsettled law that might merit the Court's attention.

The Church argues that Measure I places it "in the intolerable

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10. Petitioners' initial pleading in the California trial court did not even identify the source of the privacy right allegedly violated. In the Court of Appeal, the Church argued that the right stems from California law. Appellants' Opening Brief at 24-27. Before this Court, however, it apparently locates the right in federal law, citing *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986). Petition at 18.

position of being subject to a 'popularity contest'," averring that the result of the vote "depends not on whether a church or school is an appropriate use for its property but rather whether the electorate approves of Church and its teachings." Petition at 18. The California Court of Appeal recognized that this allegation is meritless: "The contention is based on the theory that Measure I puts the Church's religious beliefs to a popular vote. The theory is without foundation." App. at A-10. The vote is on a general plan amendment, as the measure itself plainly indicates:

> All those lands designated as "Agricultural Use" in the City of Ventura Comprehensive Plan "Land Use Map" . . . shall remain so designated . . . unless redesignated to another general plan land use category by vote of the people.

Measure I, § 2; AA at 36.

Before any claim of an invasion of a right to privacy can arise, the plaintiff must have a "reasonable expectation of privacy" in the circumstances. *See, e.g., Sheets v. Salt Lake County*, 45 F.3d 1383, 1388 (10th Cir. 1995). In the present case, the Church is simply a landowner whose property is subject to land use planning, a status that the Church has held since well before the passage of Measure I. It has no reasonable expectation of privacy about the method by which a locality will make land use decisions concerning its property. Accordingly, Measure I in no way infringes on the Church's right to privacy.

In a second attempt to employ the exception in *Boerne* where constitutional protections other than the Free Exercise clause are at issue, the Church also argues that Measure I denies it equal protection. The Church asserts that under federal law, it is "prohibited" from electioneering and must either risk its tax-exempt status by participating in a vote under Measure I or forego the right to mount a vigorous electoral campaign. Petition at 20-21. But not only does this allegation implicate only settled questions under this

Court's Free Exercise jurisprudence, it is once again based on demonstrably false allegations.

The Church is not "prohibited" from electioneering, as it alleges, for federal law does not bar tax-exempt organizations from engaging in political advocacy. The law merely denies tax-exempt status to any non-profit organization that devotes a "substantial part of its activities" toward "attempting to influence legislation," including initiatives. 26 U.S.C. § 501(c)(3); 26 C.F.R. § 1.501(c)(3). Under Measure I, the Church may place a general plan change on the ballot, campaign for it, and retain its tax-exempt status so long as these activities do not become a "substantial" part of the Church's overall activities. Thus, the legal premise for its alleged equal protection violation fails.[11] In any event, the Church has no constitutional right to maintain its tax exempt status.

In sum, because the Church may participate in an initiative campaign, Measure I does not deny it equal protection. *See Christian Gospel Church v. City and County of San Francisco*, 896 F.2d 1221, 1226 (9th Cir. 1990), *cert. denied*, 498 U.S. 999 (1990) (zoning ordinance did not violate equal protection because it did not treat a church differently from other similarly situated landowners). In the present case, the Church stands in the same position as other landowners subject to Measure I, and the measure remains a valid and neutral law of general applicability under the principles enunciated in *Smith* and reaffirmed in *Boerne*.

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11. Indeed, the federal limitation on "attempts to influence legislation" applies equally to the Church's actions that attempt to influence the land use decisions of the Ventura City Council. *See* 26 C.F.R. § 1.501(c)(3)-(c)(3)(ii)(a) (defining "attempting to influence legislation" as "contact[ing] or urg[ing] the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation"). Thus, the Church's tax-exempt status is equally relevant to its appearances before the City Council, and the voting provision of Measure I does not deny the Church equal protection.

II.

THIS CASE PRESENTS NO ISSUES MERITING SUPREME COURT REVIEW BECAUSE THE COURT OF APPEAL PROPERLY REJECTED PETITIONERS' CLAIMS.

A. Measure I's Voter Approval Requirement Is Rational.

1. The Court of Appeal Properly Rejected Petitioners' Claim That It Was Irrational or Arbitrary For City Voters to Readopt the General Plan's Agricultural Use Designations Without Simultaneously Readopting All Other Land Use Classifications.

This Court has long recognized that zoning, planning, and other types of land use regulation, by their nature, treat separate areas of land differently. *See, e.g., Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 387-88 (1926). Where, as here, such classifications do not involve suspect classifications or intrusion on fundamental rights, the rational basis test applies.[12] The Court of Appeal correctly stated and applied this test in determining that a classification scheme survives an equal protection or due process attack unless the challenger alleges facts which, if proved, would demonstrate

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12. Curiously, although petitioners repeatedly acknowledge that the rational basis test governs this claim, Petition at 8-11, the bulk of their first argument disingenuously focuses on two wholly inapplicable strict scrutiny cases, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Hunter v. Erickson*, 393 U.S. 385 (1969), and two equally inapposite Takings Clause cases, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). *See, e.g., Hunter*, 393 U.S. at 389-92 (applying " 'the most rigid scrutiny' " to a challenged city charter provision that used "an explicitly racial classification"); *Moore*, 431 U.S. at 499 (holding that because the city's ordinance on its face intruded on the " 'private realm of family life which the state cannot enter,' " and only for this reason, "the usual judicial deference to the legislature is inappropriate") (citation omitted).

that no "set of facts can be conceived that would sustain" the classification. App. at A-12; *see, e.g., Village of Euclid*, 272 U.S. at 395 (zoning restriction must be upheld unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"); *Hodel v. Indiana*, 452 U.S. 314, 331-332 (1981) ("Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights . . . carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality").

Measure I's singling out of agricultural lands for special protection readily survives this test. Indeed, federal and state courts have repeatedly recognized the rational basis for providing special protection for agricultural lands. *See, e.g., Hodel*, 452 U.S. at 331-33 (upholding special protections for "prime farmland"); *DeVita*, 9 Cal. 4th at 791, 889 P.2d at 1037 ("[T]he *particular* need for the long-term protection of *agricultural* land has been recognized both by the Legislature and by this court.") (emphasis added).[13]

Measure I's voter approval requirement simply reflects this particular need and recognizes the particular pressure exerted by developers to redesignate agricultural lands. *See DeVita*, 9 Cal. 4th at 791-92, 889 P.2d at 1037. Given this pressure, the voters could rationally conclude that such a requirement was necessary to thwart attempts by a hostile legislative body to change designations for agricultural lands. *See id.* at 796-99, 889 P.2d at 1040-42 (upholding an identical "freez[ing of] *certain* land use designations") (emphasis added). It is also conceivable, and therefore rational, that the voters

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13. Measure I's findings, which petitioners do not challenge, similarly establish agriculture's uniquely important contribution to Ventura's regional economy, in creating jobs and generating tax revenues, as well as its value as an open space resource. Measure I, § 1(A), (C), & (D), AA at 33. These findings demonstrate that, by reaffirming the land use designations previously imposed by the General Plan, the initiative advances pre-existing policies in the General Plan that recognize the need to protect agricultural and open space lands from urbanization. *See* General Plan at II-9, AA at 237.

determined that there was no need to similarly protect other lands. Thus, as the Court of Appeal correctly concluded, "it is reasonable to single out agricultural land for special treatment that makes it more difficult to change its classification." App. at A-12.

2. Accepting Petitioners' Argument Would Eviscerate California's Longstanding and Constitutionally Based Initiative Power.

As noted above, Measure I's voter approval requirement "merely formalizes" what is provided by California Elections Code section 9125, which states that initiative provisions may not be repealed or amended except by vote of the people. This statutory requirement itself reflects the reservation of the initiative power in California's Constitution. Cal. Const. Art. II, § 11; Art. IV, § 1; *see also* Cal. Const. Art. II, § 10(c) (mandating voter approval for any amendments to a statute enacted by statewide initiative). Given this statutory requirement, the inevitable result of accepting FAIR's argument would mean that the only way California voters could utilize this "basic instrument of democratic government," *City of Eastlake*, 426 U.S. at 679, to readopt any land use designations would be to readopt or establish general plan designations for *all* categories of land. Otherwise, as this Court noted in *James*, the initiative "would always disadvantage some group." 402 U.S. at 142. Petitioners cite no authority or rationale — in California or any other state — for this plainly untenable result, which would eviscerate the initiative power that the California Constitution reserved to the people.

B. The Court of Appeal Properly Determined That Nonresidents Have No Right To Vote in City Elections.

The Court of Appeal properly applied *Holt* and other voting rights cases in determining that members of FAIR who reside outside City borders, but within the City's planning area, have no right to vote in City elections. *See* App. at A-4 to A-8. FAIR contests that court's decision but is unable to find any fault with the court's

reasoning. Instead, FAIR first attempts to distinguish *Holt*, raising numerous red herrings, and then selectively quotes from Ventura County's voluntary guidelines in an apparent effort to show that, notwithstanding the fact that state law grants exclusive jurisdiction over their land uses to the County, Measure I somehow controls the use of their land. As discussed below and in the Court of Appeal's well-reasoned decision, each of these arguments is without merit.

For instance, FAIR conclusorily asserts that Measure I "controls land use" of property outside its jurisdiction, Petition at 14, apparently in an effort to come within the narrow exception that this Court alluded to in a footnote in *Holt*. There, the Court held that nonresidents are entitled to vote in municipal elections *only* in one set of exceptional circumstances:

> a situation in which a city has annexed outlying territory in all but name, and is exercising *precisely the same governmental powers* over residents of surrounding unincorporated territory as it does over those residing within its corporate limits.

Holt, 439 U.S. at 73 n.8 (emphasis added). To come within this exception and thereby state a cause of action for violation of its members' voting rights, FAIR here must allege that the authority exercised by the City of Ventura within its planning area "is no less than that exercised by the city within its corporate limits." *Id.* FAIR however, cannot make such an allegation because, as the Court of Appeal explained, "[u]nlike the statutes upheld in *Holt*, Measure I has no actual regulatory effect in the unincorporated areas of the County." App. at A-7; *see also* Respondents' Brief at 8-16.

FAIR's discussion of its members' "special interest" in elections under Measure I, Petition at 13, is likewise a red herring. In *Holt*, the Court held that, in certain special interest elections, "[b]ona fide residence *alone* [] does not automatically confer the right to vote on all matters . . . ." *Holt*, 439 U.S. at 69 (emphasis

added). That the state "may constitutionally disenfranchise residents who lack the required special interest," *id.*, however, does not remotely suggest that *non*-residents who purport to have a special interest therefore have a constitutional right to vote.

Similarly without merit is FAIR's contention that, in the event their land ultimately is annexed to the City, they will be presented with a *fait accompli*. Petition at 15. The same could be said for the full array of City decisions that would affect petitioners' property and other rights in the hypothetical case that it was ultimately annexed. Nonetheless, petitioners' property is no more controlled by Measure I's pre-planning, than petitioners are currently taxed by City tax assessments that would apply to their land in the event that it is annexed. The County's Guidelines do not — and, under state law, cannot — alter the fact that it is the County that retains regulatory control, any more than a County policy of applying City's tax assessment rates would mean that the City was taxing petitioners. In both cases, petitioners' real dispute is with the County, in whose elections they are entitled to vote.

C. The Court of Appeal Properly Rejected Petitioner Church's Purported Freedom of Religion Claim.

Petitioner Church also alleges that, as applied to it, Measure I violates the First Amendment. The Church constructs its argument on an allegation of its complaint that is so demonstrably erroneous that all lower courts rejected it as a basis for stating a cause of action. The allegation is that because the Church's property is designated agricultural in the City of Ventura's plan, and thus is subject to a Measure I vote, any such vote will pass on the Church's teachings, not on the planning designation for the property. *See* Petition at 15 ("Subjecting a Church's Teaching to a Popular Vote Violates the Church's Rights to Freedom of Religion, Privacy, Equal Protection and Due Process.")

This allegation deliberately misreads the requirements of Measure I. Under that measure's plain and uncontestable language,

the vote is on a land use designation, not on the Church's teachings. The mere fact that a church owns property subject to Measure I does not transform a vote affecting that property into a vote on the Church's teaching. Indeed, under the logic of the Church's argument, *any* land use restriction on Church-owned property, whether imposed by a vote of the people or by the City Council, would impermissibly burden the Church and its teaching, and thus would violate the Free Exercise Clause.

The California Court of Appeal refused to recognize such illogic, holding that state law did not compel it to treat such obviously contrived allegations as true for purposes of demurrer. App. at A-9 ("Unlike allegations of fact, we are not bound on demurrer to treat such conclusions as true. [Citation omitted]. The allegation is belied by the terms of Measure I."). The Church now alleges that "for purposes of a demurrer," the Court of Appeal erred in its approach. Petition at 17. But that question presents only an issue of state procedural law concerning how California courts may construe pleadings, not a reason for this Court to involve itself. The fact remains that the Church asks the Court to grant its petition based on an allegation unquestionably rebutted by the plain language of the legal instrument challenged in the litigation.

Once this utterly fictional characterization of the Measure I vote is discarded, the Church clearly presents no constitutional issue worthy of this Court's attention. The Court's seminal 1990 decision *Employment Division, Department of Human Resources of Oregon v. Smith*, *supra*, set forth the framework for determining whether Measure I violates the Free Exercise Clause. Here, Measure I easily passes that two-part test. First, the measure is neutral in its object. As stated in Section 1 of the measure, its intent is to protect existing agricultural and watershed land. The measure's purpose is thus not the type of invidious purpose needed to support a cause of action for violation of the right to freedom of religion. *Compare Church of the Lukumni Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (the history of an ordinance barring ritual slaughter of animals discloses that its object was to target animal sacrifice by

worshipers). Second, the measure is generally applicable; it applies to all properties that had been designated for "Agricultural Use" in the City's General Plan prior to the measure's adoption.[14]

In short, in *Smith* the Court established the framework for consideration of the Church's Free Exercise challenge. The allegations of the complaint in the instant case present nothing more than a routine application of those settled principles, as all lower courts that reviewed those allegations have concluded.

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14. Petitioner Church argues that a "less restrictive means" than voting is available to the City: it could allow the Church to apply for redesignation of its property to the City Council, rather than the voters. Petition at 18. Under *Smith*, however, the issue is not whether a less restrictive means is available; it is whether the law is neutral and generally applicable. Moreover, as the California Supreme Court observed in its leading 1995 opinion, *DeVita v. Napa County*, *supra*, the purpose of such voting requirements is to ensure that hostile city councils will not thwart the will of the people as expressed through their use of the initiative power. 9 Cal. 4th at 797, 889 P.2d at 1041. The "less restrictive means" advocated by the Church would eviscerate that purpose.

CONCLUSION

For the reasons stated above, the Court should deny FAIR's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX 1 — ORDER OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SECOND APPELLATE DISTRICT, DIVISION SIX, FILED OCTOBER 30, 1996

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

B106055
Sup.Ct. No. 162842
(Ventura County)
(Hon. John Hunter, Judge)

FAIR, et al.,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF VENTURA,

Respondent,

CITY OF SAN BUENAVENTURA, etc., et al.,

Real Parties in Interest

ORDER

THE COURT:

We take judicial notice that petitioners have filed a notice of appeal (B105879). We deny the petition. (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 372; *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 128.)

APPENDIX 2 — ORDER OF THE SUPREME COURT OF CALIFORNIA, FILED DECEMBER 18, 1996

Second Appellate District, Division Six, No. B106055
S057282

IN THE SUPREME COURT OF CALIFORNIA

FAIR Et Al.,

Petitioners

v.

VENTURA SUPERIOR COURT,

Respondent

CITY OF SAN BUENAVENTURA Et Al.,

Real Parties In Interest

Petition for review DENIED.

s/ George
Chief Justice